

James Madison to Peter S. Duponceau, August, 1824. Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York: G.P. Putnam's Sons, 1900-1910.

TO PETER S. DUPONCEAU. CHIC. HIST. SOC. MSS.

Montpellier Aug 1824.

Dr. Sir I recd. the copy of your discourse on the Jurisdiction of the courts of the U. S. with which you favoured me, at a time when I could not conveniently read it; and I have since been obliged to do it with such interruptions that I am not sure of having done entire justice to your investigations.¹

¹ *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*. Philadelphia, 1824.

I have certainly found in the volume ample evidence of the distinguished ability of which the public had been made sensible by other fruits of your pen.

I must say at the same time that I have not been made a convert to the doctrine that the "Common Law" as such is a part of the law of the U. S. in their federo-national capacity. I can perceive no legitimate avenue for its admission beyond the portions fairly embraced by the Common law terms used in the Constitution, and by acts¹ of Congress authorized by the Constitution as necessary & proper for executing the powers which it vests in the Government.

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1 By these the common Law or any other laws may be sanctioned or introduced within the territories or other places subject to the conclusive power of Legislation vested in Congress.— *Madison's Note*.

A characteristic peculiarity of the Govt. of the U. States is,

that its powers consist of special grants taken from the general mass of power, whereas other Govts. possess the general mass with special exceptions only. Such being the plan of the Constitution, it cannot well be supposed that the Body which framed it with so much deliberation, and with so manifest a purpose of specifying its objects, and defining its boundaries, would, if intending that the Common Law shd. be a part of the national code, have omitted to express or distinctly indicate the intention; when so many far inferior provisions are so carefully inserted, and such appears to have been the public view taken of the Instrument, whether we recur to the period of its ratification by the States, or to the federal practice under it.

That the Constitution is predicated on the existence of the Common Law cannot be questioned; because it borrows therefrom terms which must be explained by Com: Law authorities: but this no more implies a general adoption or recognition of it, than the use of terms embracing articles of the Civil Law would carry such an implication.

Nor can the Common Law be let in through the authority of the Courts. That the whole of it is within their jurisdiction,

is never alledged, and a separation of the parts *suited* from those *not suited* to the peculiar structure & circumstances of the U. States involves questions of *expediency & discretion*, of a Legislative not Judicial character. On questions of criminal law & jurisdiction the strict rule of construction prescribed by the Com: Law itself would seem to bar at once an assumption of such a power by the Courts.

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If the Common Law has been called our birthright, it has been done with little regard to any precise meaning. It could have been no more our birthright than the Statute law of England, or than the English Constitution itself. If the one was brought by our ancestors with them, so must the others; and the whole consequently as it stood during the Dynasty of the Stuarts, the period of their emigration, with no other exceptions than such as necessarily resulted from inapplicability to the colonial state of things. As men our birthright was from a much higher source than the common or any other human law and of much greater extent than is imparted or admitted by the common law. And as far as it might belong to us as British subjects it must with its correlative obligations have expired when we ceased to be such. It would seem more correct therefore & preferable in every respect that the common law, even during the Colonial State, was in force not by virtue of its adhesion to the emigrants & their descendants in their individual capacity but by virtue of its adoption in their social & political capacity.

How far this adoption may have taken place through the mere agency of the courts cannot perhaps be readily traced. But such a mode of introducing laws not otherwise in force ought rather to be classed among the irregularities incident to the times & the occasion, than referred to any in G. Britain, where the courts though sometimes making legal innovations *per saltus* profess that these should grow out of a series of adjudications, gradually accommodating the law to the gradual change of circumstances in the ordinary progress of society. On sound principles, no change whatever in the state of the Law can be made but by the Legislative authority; Judicial decisions being not more competent to it than Executive proclamations.

But whatever may have been the mode or the process by which the Common law found its way into the colonial codes, no regular passage appears to have been opened for it into that of the [U.] S. other than through the two channels above mentioned; whilst every plea for an irregular one is taken away, by the provident article in the constitution for correcting its errors & supplying its defects. And although a frequent resort to this remedy be very

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undesirable, it may be a happy relief from the alternative of enduring an evil or getting rid of it by an open or surreptitious usurpation.

I must not forget however that it is not my intention to enter into a critical, much less a controversial examination of the subject; and I turn with pleasure from points on which we may differ, to an important one on which I entirely agree with you. It has always appeared to me impossible to digest the unwritten law or even the penal part of it, into a text that would be a complete substitute. A Justinian or Napoleon Code may ascertain, may elucidate, and even improve the existing law, but the meaning of its complex technical terms, in their application to particular cases, must be sought in like sources as before; and the smaller the compass of the text the more general must be its terms & the more necessary the resort to the usual guides in its particular applications.

With assurances of my high esteem I pray you Sir, to accept my unfeigned good wishes